EXHIBIT A.

In the United States District Court for the
Eastern District of Tennessee,
Northeastern Division.

Order of Railway Conductors & Brakemen and Brotherhood of Railway Trainmen, Plaintiffs, v. The Clinchfield Railroad Company, Defendant.	}	Civil Action No. 2100.

MEMORANDUM OPINION AND ORDER.

(Filed Nov. 10, 1967.)

The jurisdiction of this Court is sought to be invoked by the plaintiffs-union under 28 U. S. C., §§ 1331 and 1337 for the purpose of impeaching and contesting an award of an arbitration board of the National Mediation Board, rendered on May 3, 1967, and for a declaratory judgment, 28 U. S. C., §§ 2201-2202. At the pretrial conference of August 11, 1967 herein, the Court was of the opinion that there could be a disposition of this action on the bases of proper motions filed by the respective parties. The defendant interposed a motion to dismiss the complaint, on the ground that this Court lacks jurisdiction under 28 U. S. C., §§ 1331 or 1337 or 2201-2202 or under 45 U. S. C., §§ 159, Third, and further because this action does not arise under the Railway Labor Act, 45 U. S. C., §§ 151 *et seq.* The plaintiffs-union filed no motion.

The facts essential to a disposition are undisputed, *viz.*: The respective plaintiffs-union and the defendant railroad

entered into separate bargaining agreements, both which were in effect in 1965. Article 7 of each of these agreements is essentially the same and is concerned with the pooling by the defendant railroad of its cabooses.

By § (a) of that article, the contracting parties adopted procedures, as set forth in §§ (b) and (c) thereof, governing the conduct of the parties in the event the defendant railroad wished to invoke such pooling plan. Subsection (1) of § (c) describes the method by which the contracting parties shall "• • • endeavor to agree upon any facilities that should be furnished [by the railroad] to provide accommodations substantially equivalent to those formerly available on the cabooses and used by the employees [of the railroad] and on appropriate arrangements for [the railroad's] supplying and servicing such pooled cabooses."

The railroad sought to institute the pooling system adverted to at its yards in Erwin, Tennessee. A controversy arose within the jurisdiction of this Court, and the contracting parties conferred in acocrdance with Article 7, § (c) (1) on May 29, 1965 but were unable to agree on the facilities, accommodations and arrangements appertaining to the pooling.

The carrier then invoked the services of the National Mediation Board, agreeably with Article 7, § (c) (2), on June 1, 1965. A mediator of that Board undertook to inspire an amicable settlement of the issue between the contracting parties. The Board declared on September 24, 1965, that the best efforts of its mediator to bring about an amicable settlement of the issue through mediation had been unsuccessful.

Article 7, § (c) (3), provides as follows:

> "• • • If mediation fails, the parties agree that the dispute shall be submitted to arbitration under the Railway Labor Act, as amended. • • •"

Thus, "* * * The arbitration procedure to be followed was that prescribed in the agreement[s] executed between the carrier and the * * *" respective plaintiffs-union. **Batts v. Louisville and Nashville Railroad Company**, C. A. 6th (1963), 316 F. (2d) 22, 27 [2]. Obviously, those agreements prescribed that, where, as here, negotiations of the parties for a settlement of this particular dispute were unsuccessful and mediation had failed, the controversy would "* * * be submitted to arbitration under the Railway Labor Act, as amended. * * *"

Arbitration under the Railway Labor Act is by submission of the controversy to "* * * a board of three (or, if the parties to the controversy so stipulate, of six) persons * * *." 45 U. S. C., § 157, First. The board of arbitration, under the Act, is required by 45 U. S. C., § 157 (f), to certify and transmit the original copy of its award, together with certain other documents, to the clerk of the district court of the United States for the district wherein the controversy arose or the arbitration is entered into, to be filed in said clerk's office. See also 45 U. S. C., § 159, First. The award becomes conclusive on the parties, unless within a specified period, a petition to impeach the award on one or more certain grounds is filed in the clerk's office of the court in which the award has been made. 45 U. S. C., § 159, Second. Such court is authorized and empowered to entertain a petition for the impeaching or contesting of such award if, *inter alia*, one of the grounds assigned is that the award does not conform to the stipulations of the agreement to arbitrate. 45 U. S. C., § 159, Third (b).

The aforementioned controversy of these parties was submitted to arbitration at Erwin, Tennessee, within this District, to a board of five persons, comprised of two representatives of the carrier, one representative of the plaintiff Order of Railway Conductors, one representative of the plaintiff Brotherhood of Railroad Trainmen and

Brakemen, and a neutral member thereof, selected by the National Mediation Board.[1] Such board certified and transmitted the original copy of its award and the required documents to the clerk of this Court, and same were filed by the clerk on May 3, 1967, and docketed as miscellaneous docket No. 12.[2] Within the period specified by 54 U. S. C., § 159, Second, the plaintiffs-union filed their petition to impeach and contest the award on the ground, *inter alia,* that the award does not conform to the stipulations of the respective agreements of the parties litigant to arbitrate. 45 U. S. C., § 159, Third (b).

This Court is ever mindful of the clearly established national policy to encourage the use of arbitration. **Rhine v. Union Carbide Corporation,** C. A. 6th (1965), 343 F. (2d) 12, 16 [12]. When the judiciary undertakes to determine the merits of a labor dispute under the guise of interpreting the procedures in collective bargaining agreements, "* * * it usurps a function which under the regime is entrusted to the arbitration tribunal. * * *" **United Steelworkers v. American Mfg. Co.** (1960), 363 U. S. 564, 569, 80 S. Ct. 1343, 4 L. Ed. (2d) 1403, 1407 (headnote 7). This Court pretermits all consideration of the merits of the dispute of the parties, but, "* * * the courts have long ruled that there must be strict adherence to the essential terms of the agreement to arbitrate. * * *" **Brotherhood of R. and S. Cl., etc. v. Norfolk So. Ry. Co.,** C. A. 4th (1944), 143 F. (2d) 1015, 1017 [3]; **McCormick v. Gray** (1851), 13 How. 26, 37-38, 13 L. Ed. 36, 40-41; see also 5 Am. Jur. (2d) 540, Arbitration and Award, § 26.

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[1] The Court has considered and rejected the strained concept that there were in actuality **two** boards of arbitration considering the same dispute under two separate agreements, with the neutral person serving concurrently as the third member of each of the two boards of three persons.

[2] This Court takes judicial notice of these, its own records, in the instant consideration.

The contracting parties themselves invoked, with a specific condition precedent, the statutory arbitration procedures of the Railway Labor Act. "* * * The Court, as in the case of all agreements, must give effect to the intent of the parties as evidenced by the agreement[s] [themselves] which will be liberally construed to that end. The Court further observes that although an arbitration agreement has the formal aspects of a contract, it nevertheless, by its very nature, assumes the absence of an agreement between the parties,[3] other than the basic agreement on the mode of settlement. Arbitration is, then, a method, a means, a procedure, rather than an agreement. * * *" **Arlington Towers Land Corp. v. John McShain, Inc.**, D. C. D. C. (1957), 150 F. Supp. 904, 923 [3].

When private negotiations and mediation both failed, this issue became governed by the Railway Labor Act, and the failure of the parties to comply with the procedure set forth in 45 U. S. C., § 157, First, resulted in proceedings which did not, "* * * supply the foundation for a valid arbitration and award * * *", 5 Am. Jur. (2d) 539-540, Arbitration and Award, § 25. The terms of the submission of this controversy to arbitration were relevant portions of the parties' agreements, and where the matters which were determined by the board were not within the terms of the submission, i. e., within the arbitration provisions of the contracts, the arbitrators "* * * exceed[ed] their jurisdiction, and their award may be set aside * * *" in this proceeding. **Texoma Natural Gas Co. v. Oil Workers I. U., Etc.**, D. C. Tex. (1943), 58 F. Supp. 132, 146-147 [14], affirmed C. A. 5th (1944), 146 F. (2d) 62, certiorari denied (1945), 324 U. S. 872, 65 S. Ct. 1017, 89

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[3] As to the absence of agreement within an agreement to arbitrate, **cf. Local Union No. 988, Etc. v. B. & T. Metals Co.**, C. A. 6th (1963), 315 F. (2d) 432, 436 [2], and cases there cited and quoted from.

L. Ed. 1426, rehearing denied (1945), 325 U. S. 893, 65 S. Ct. 1183, 89 L. Ed. 2004.

This Court is clothed with original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce. 28 U S. C., § 1337. The Railway Labor Act, 45 U. S. C., §§ 151 *et seq.* is an Act of Congress regulating commerce. 45 U. S. C., §§ 151, First, Fourth and Fifth, 151a. The plaintiffs-union allege that this action or proceeding is brought particularly under 45 U. S. C., § 159, Third. This properly invokes the jurisdiction of this Court, under all the circumstances, under 28 U. S. C., § 1337. See **Felter v. Southern Pacific Co.** (1959), 359 U. S. 326, 329, 79 S. Ct. 847, 3 L. Ed. (2d) 854, 858 (headnote 3). The defendant's motion of September 5, 1967 to dismiss this action or proceeding for want of jurisdiction, therefore, hereby is

Denied.

It appearing to the Court that the provisions of 45 U. S. C., § 157, First, with reference to the composition of the membership of the board of arbitration under which the parties litigant agreed to submit this controversy to arbitration, constitute essential terms of their agreement to arbitrate, **Brotherhood of R. and S. Cl., etc. v. Norfolk So. Ry. Co.**, *supra*; **McCormick v. Gray**, *supra*; 5 Am. Jur. (2d), *supra*, at 540; and that there was not strict adherence to such essential terms of the agreements to arbitrate in this instance, the Court will now entertain a motion for a summary judgment on this point from the plaintiffs-union.

Enter:

C. G. Neese,
United States District Judge.

For publication.

EXHIBIT B.

OPINION.

(Filed Mar. 4, 1969.)

No. 18519.

United States Court of Appeals
For the Sixth Circuit.

Order of Railway Conductors and Brakemen and Brotherhood of Railroad Trainmen, Plaintiffs-Appellees, v. Clinchfield Railroad Company, Defendant-Appellant.	On Appeal from the United States District Court for the Eastern District of Tennessee, Northeastern Division.

Decided March 4, 1969.

Before: McCree and Combs, Circuit Judges, and McAllister, Senior Circuit Judge.

Combs, Circuit Judge. The Order of Railway Conductors and Brakemen and the Brotherhood of Railroad Trainmen filed this action to impeach an award under Section 9 of the Railway Labor Act, 45 U. S. C., § 159. Defendant-appellant, Clinchfield Railroad Company, moved to dismiss the action as beyond the court's jurisdiction. The district court denied the railroad's motion and entered summary judgment, granting the relief sought by the unions. This appeal followed.

The controversy concerns the railroad's rights with regard to the "pooling of cabooses." It had been a long-standing custom of Clinchfield Railroad that designated cabooses would be assigned to certain train runs. Thus, workers on a particular run were always assured of having the same caboose. The men could thereby equip and maintain the caboose to their liking and assure themselves that off-duty time and lay-overs would be spent in comfortable and familiar surroundings.

This practice was not without difficulty for the railroad. When cabooses were not being used, they were placed on a siding at the terminal specifically reserved for cabooses. Apparently it was not feasible to place the cabooses on the siding in any particular order. Thus, when a given caboose was needed, there might be several other cabooses in front of it, necessitating considerable movement and replacement of cars to get a caboose on its assigned train.

The collective bargaining agreements between Clinchfield and the unions provided procedures to be followed should the railroad desire to change the system of caboose assignment and "pool" its cabooses, that is, assign cabooses on a random basis, or to furnish lay-over facilities other than cabooses. The purpose of these procedures was to require an orderly resolution of any differences that might arise over the employees' substitute accommodations. In relevant part, these procedures were as follows:

> "(1) Whenever the carrier desires to so pool its cabooses, it shall give notice to the General Chairman or General Chairmen of such intention, specifying the territory and service involved, whereupon the carrier and employee representative shall, within 30 days, endeavor to agree upon any facilities that should be furnished to provide accommodations substantially equivalent to those formerly available on the cabooses and used by the employees and on appropriate ar-

rangements for supplying and servicing such pooled cabooses.

"(2) In the event the carrier and such representatives cannot so agree on the matter, any party involved may invoke the services of the National Mediation Board.

"(3) If mediation fails, the parties agree that the dispute shall be submitted to arbitration under the Railway Labor Act, as amended. The decision of the Arbitration Board shall be final and binding upon both parties."[1]

The general chairmen of appellee unions were asked to meet on April 6, 1965, with L. R. Beals, personnel officer of the Clinchfield Railroad. Beals informed them that the railroad had decided to pool all cabooses. The unions advised him they they were opposed to such action, but the railroad announced that commencing April 16, 1965, all cabooses would be pooled. The union responded by demanding that the railroad comply with the above quoted procedures of the collective bargaining agreements, and the railroad agreed.

The dispute continued through the stages of negotiation and mediation without resolution, the parties being in conflict as to the substitute facilities which should be provided. The unions contended that the railroad had no right to pool the cabooses. This contention was based on a clause of the collective bargaining agreements which provided as follows:

"The employees affected by this rule and the carriers represented by the Eastern, Western and Southeastern Carriers' Conference Committees, being de-

[1] These procedures are set out in Article 7, Pooling of Cabooses, in the Brotherhood of Railroad Trainmen Agreement of May 25, 1951, and the Order of Railway Conductors and Brakemen Agreement of May 23, 1952.

sirous of cooperating in situations *where train service can be improved and trains expedited* by the pooling of cabooses, adopt the following: . . .'' (Emphasis ours.)

The unions contend that the italicized clause made it incumbent upon the railroad to show that train service could be improved and trains expedited prior to any negotiations on facilities. In spite of this contention, however, the unions vigorously pressed their demands for various substitute facilities. By September 8, 1965, the dispute had progressed through the mediation stage without success and the railroad wrote the National Mediation Board, requesting that an arbitration board be established.

On September 9, 1965, the unions requested the mediation board to postpone the case in order to allow the parties more time to resolve the dispute, or to permit the Unions to seek an interpretation of the bargaining agreements. The board denied this request and requested that the parties proceed toward arbitration. The railroad named an arbitrator and asked the unions to do likewise. The unions responded by naming two arbitrators, one from each organization. The parties being unable to agree on a neutral arbitrator, the railroad requested that the mediation board name such a person.

The unions asked that the railroad's request for a neutral arbitrator be held in abeyance by the board until a construction of the bargaining agreements could be obtained. The requested delay was denied by the mediation board and, shortly thereafter, a neutral arbitrator was named. The arbitration board was eventually composed of five members since, following the designation of two arbitrators by the unions, the railroad named another member.

The unions again contended at the arbitration proceedings that the board was without jurisdiction until the

bargaining agreements were interpreted in other proceedings. The neutral arbitrator, however, ruled that jurisdiction existed and the merits of the dispute were considered. An arbitration award was made and, on May 3, 1967, the award was filed in the United States District Court for the Eastern District of Tennessee, as required by 45 U. S. C., §§ 157 Third (f) and 159 First.

Sections 7 and 9 of the Act require that, following submission of a controversy to arbitration and the arbitrators' resolution of the matter, the award and the record of the proceedings shall be filed in an appropriate district court. In the absence of a petition to impeach the award within ten days after such filing, judgment is entered upon the award and it becomes final.

The unions filed a timely petition to impeach the arbitration award. The district court in holding for the unions found that the statutory provision of 45 U. S. C., § 157 First, requiring an arbitration board of either three or six members, was not complied with. The railroad's motion to dismiss the action as beyond the court's jurisdiction was based on the theory that the arbitration was held pursuant to common law rather than the Railway Labor Act. This motion was properly dismissed since it is clear that, in view of the negotiation procedures actually followed, the arbitration was held pursuant to the Act.

The Railway Labor Act contains no requirement of compulsory arbitration. The mandatory provisions of the Act are exhausted when the parties finish mediation. As an alternative to self-help in the form of unilateral contract change, or a strike, the Act provides a voluntary arbitration procedure which may be invoked upon the parties' written agreement to arbitrate. The union's principal argument for sustaining the district court's decision stems from the supposed inadequacy, or the absence, of an agreement to arbitrate as contemplated by Section 8 of the Act. 45 U. S. C., § 158.

The grounds upon which a district court may properly impeach an arbitration award are enumerated in Section 9 Third of the Act. 45 U. S. C., § 159. The unions contend on this appeal that the award was properly set aside by the district court because "the proceedings were not substantially in conformity with [the Act]." 45 U. S. C., § 159 Third (a). They complain especially about the improper number of arbitrators and the lack of a specific agreement to arbitrate.

The courts are properly reluctant to enter a controversy which is subject to arbitration or to discard the fruits of an arbitration fairly conducted. *Steelworkers* v. *Enterprise Corp.*, 363 U. S. 593 (1960); *Steelworkers* v. *Warrior & Gulf Co.*, 363 U. S. 574 (1960); *Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564 (1960).

It is also well settled that defects in proceedings prior to or during arbitration may be waived by a party's acquiescence in the arbitration with knowledge of the defect. *Chicago R. I. & P. Ry. Co.* v. *Union Pac. R. Co.*, 254 Fed. 235 (8th Cir. 1918); *Arbitration: Ilios S & T Corp. and American Anthracite & Bituminous Coal Corp.*, 148 F. Supp. 698 (D. C. N. Y. 1957); *Petrol Corporation* v. *Groupement D'Achat des Carburants*, 84 F. Supp. 446 (D. C. N. Y. 1949); 6 C. J. S., *Arbitration and Award*, § 69 (1937). Moreover, if the impeaching party's own action contributes to a variance from the prescribed procedure, such party may be estopped to complain of the variance. 5 Am. Jur. 2d, *Arbitration and Award*, § 183 (1962).

We conclude that the district court erred in impeaching the arbitration award. The district judge in his memorandum opinion emphasized that the arbitration board was composed of five members, whereas the statute, 45 U. S. C., § 153 First, provides that the board shall consist of three persons or, if the parties to the controversy so

stipulate, of six persons. We are of the opinion that the unions waived their right to object to the statutory departure by participating in the arbitration proceedings without objection on this point.

The difficult question concerns the sufficiency of the agreement to arbitrate required by Section 8 of the Railway Labor Act. While no specific agreement to arbitrate was executed, we think the collective bargaining agreement itself was such an agreement. To the extent the bargaining agreement does not meet the requirements of the Act, the variance was waived by the Unions.

The procedures of the collective bargaining agreements, which culminated in the arbitration of this dispute, were initiated at the insistence of the unions. At each of the three procedural levels—negotiation, mediation, and arbitration—the unions presented their views on the merits of the dispute. The only objection made by the unions was that the railroad had no right to pool cabooses and that the case should be held in abeyance until an interpretation of the bargaining agreements could be obtained. That point was decided adversely to the unions by the mediation board and by the arbitrators. The correctness of that decision was not raised in their complaint to impeach the award, apparently because the unions recognize that a court is reluctant to remove a dispute from arbitration under the guise of interpreting a bargaining agreement. *Steelworkers v. Warrior & Gulf Co.*, 363 U. S. 574 (1960).

The judgment of the district court is reversed and the case is remanded for entry of judgment on the award, as provided by 45 U. S. C., § 159 Second.

EXHIBIT C.

(Letterhead of Order of Railway Conductors and Brakemen, Cedar Rapids, Iowa 52401.)

December 24, 1965

12-W-Clinchfield

Mr. Thomas Tracy
Executive Secretary
National Mediation Board
Washington, D. C. 20572

Dear Mr. Tracy:

This will acknowledge my copy of your letter of December 16, 1965, NMB Case No. A-7432, concerning a dispute between the Clinchfield Railroad Company and the Order of Railway Conductors and Brakemen and the Brotherhood of Railroad Trainmen. You call for my comments regarding the request of Mr. L. R. Beals that the National Mediation Board should name a neutral arbitrator and proceed to arbitrate the dispute.

These parties are in serious disagreement over the meaning of the national agreements as they relate to the carrier request, and it is our position that this carrier request under the circumstances which exist does not come under the scope of the national rule, which was not intended to serve as a vehicle by which carriers could progress a request to pool cabooses in a situation where the train service could not be improved or trains expedited thereby. Neither the National Mediation Board nor the arbitration procedure contemplated in Article 7 (c) (3) of the national agreement would have jurisdiction in interpret the meaning of Article 7 with regard to the validity of the carrier's request under that rule, which

is a vital part of the dispute betwen the parties. On the other hand, Article 14 of the national agreement dated May 23, 1952 contains a provision for the resolution of disputes which involve the interpretation or application of the terms of the agreement, including Article 7, and therefore that national disputes committee has jurisdiction over the dispute over the validity of the carrier's request. Since there is a vital issue over the scope of the agreement which would otherwise provide for arbitration, it is our firm position that arbitration is not in order until and unless the dispute over the validity of the request has been resolved. It is our further position that the National Mediation Board would have no authority to proceed with the appointment of an arbitrator under these circumstances pending resolution of the dispute over the meaning of Article 7, unless there is mutual agreement between the parties to dispute over the questions to be arbitrated. We are definitely not agreeable to proceed with arbitration under these circumstances.

It should also be noted that the Clinchfield Railroad Company elected to adopt Article 7 of the May 23, 1952 Agreement and in so doing did not preserve any existing rules or practices that may have been in effect prior to August 1, 1952. Therefore, Article 7 of the May 23, 1952 Agreement is the only rule or practice in full force and effect on that property concerning pooling cabooses.

It is the Order's position that Article 7 of the National Agreement is not applicable in this particular situation. If the Order's position is upheld by the Disputes Committee concerning the May 23, 1952 Agreement then the only course left for the Clinchfield Railroad to follow is via Section 8 of the Railway Labor Act.

We respectfully ask that the National Mediation Board hold the request of Mr. Beals in abeyance pending the resolution of the existing dispute between the parties as

to the meaning of Article 7 of the national agreement as it relates to the issue in tihs case, which dispute is under the jurisdiction of the Disputes Committee created by Article 14 of such national agreement. Please advise.

Very truly yours,

/s/ G. H. Harris,
G. H. Harris,
President.

CC: W. W. Carson
J. L. Kelley
C. Luna
J. M. King

EXHIBIT D.

(Letterhead of Brotherhood of Railroad Trainmen, General Offices, Cleveland, Ohio.)

CL:17:hb

December 22, 1965

Mr. Thomas A. Tracy
Executive Secretary
National Mediation Board
Washington, D. C. 20572

Dear Mr. Tracy:

This will acknowledge my copy of your letter of December 16, 1965 MMB Case No. A-7432, concerning a dispute between the Clinchfield Railroad Company and the Brotherhood of Railroad Trainmen and Order of Railway Conductors and Brakemen. You call for my comments regarding the request of Mr. L. R. Beals that the National Mediation Board should name a neutral arbitrator and proceed to arbitrate the dispute.

These parties are in serious disagreement over the meaning of the national agreements as they relate to the carrier request, and it is our position that this carrier request under the circumstances which exist does not come under the scope of the national rule, which was not intended to serve as a vehicle by which carriers could progress a request to pool cabooses in a situation where the train service could not be improved or trains expedited thereby. Neither the National Mediation Board nor the arbitration procedure contemplated in Article 7 (c) (3) of the national agreement would have jurisdiction to interpret the meaning of Article 7 with regard to the validity of the carrier's request under that rule, which is a vital part of the dispute between the parties. On the other hand, Article 14 of the national agreement dated May 25,

1951 contains a provision for the resolution of disputes which involve the interpretation or application of the terms of the agreement, including Article 7, and therefore that national disputes committee has jurisdiction over the dispute over the validity of the carrier's request. Since there is a vital issue over the scope of the agreement which would otherwise provide for arbitration, it is our firm position that arbitration is not in order until and unless the dispute over the validity of the request has been resolved. It is our further position that the National Mediation Board would have no authority to proceed with the appointment of an arbitrator under these circumstances pending resolution of the dispute over the meaning of Article 7, unless there is mutual agreement between the parties to dispute over the questions to be arbitrated. We are definitely not agreeable to proceed with arbitration under these circumstances.

We respectfully ask that the National Mediation Board hold the request of Mr. Beals in abeyance pending the resolution of the existing dispute between the parties as to the meaning of Article 7 of the national agreement as it relates to the issue in this case, which dispute is under the jurisdiction of the Disputes Committee created by Article 14 of such national agreement. Please advise.

Very truly yours,

Charles Luna,
President.

cc:
Mr. G. H. Harris, Pres., ORC&B
Mr. J. M. King, Vice President, BRT
Mr. W. D. Nidiffer, OGGC, Clinchfield (BRT)
Mr. W. W. Carson, Vice President, ORC&B.

EXHIBIT E.

NATIONAL MEDIATION BOARD.

ARBITRATION BOARD.

In the Matter of: The Clinchfield Railroad Company and Brotherhood of Railroad Trainmen, and Order of Railway Conductors and Brakemen.	Arbitration Board No. 292 Case A-7432, Pooling of Cabooses.

(Award Rendered May 3, 1967.)

AWARD.

This Arbitration Board was created January 3, 1966, by the National Mediation Board in response to the Carriers' request of December 7, 1965. The case arises out of the Carriers' attempt to pool cabooses under the provisions of Article 7, Pooling of Cabooses, in the Brotherhood of Railroad Trainmen Agreement of May 25, 1951 and the Order of Railway Conductors and Brakemen Agreement of May 23, 1952. In all material respects the pooling of cabooses provisions in both Agreements are essentially the same. The provision as it appears in these Agreements reads as follows:

Article 7.

POOLING OF CABOOSES.

(a) The employees affected by this rule and the carriers represented by the Eastern, Western and South-eastern Carriers' Conference Committees, being desirous of cooperating in situations where train serv-

ice can be improved and trains expedited by the pooling of cabooses, adopt the following:

(b) Where an individual carrier not now having the right of pooling cabooses considers it advisable to establish such pooling, appropriate committee or committees representing the employees involved and proper representatives of the carrier will conduct negotiations relating thereto.

(c) A reasonable and practical approach to the problems herein referred to, namely—the pooling of cabooses—requires that the carriers and the employees definitely recognize each other's fundamental rights, and where necessary, reasonable and fair arrangements should be made in the intrest of both parties.

It is further agreed that:

(1) Whenever the carrier desires so to pool its cabooses, it shall give notice to the General Chairma or General Chairmen of such intention, specifying the territory and service involved, whereupon the carrier and employee representative shall, within 30 days, endeavor to agree upon any facilities that should be furnished to provide accommodations substantially equivalent to those formerly available on the cabooses and used by the employees and on appropriate arrangements for supplying and servicing such pooled cabooses.

(2) In the event the carrier and such representatives cannot so agree on the matter, any party involved may invoke the services of the National Mediation Board.

(3) If mediation fails, the parties agree that the dispute shall be submitted to arbitration under the Railway Labor Act, as amended. The decision of

the Arbitration Board shall be final and binding upon both parties.

(d) This rule shall become effectiye August 1, 1951, except on such carriers as may elect to preserve existin grules or practices and so notify the authorized employee representatives on or before July 1, 1951.

After the Arbitration Board was constituted, the Organizations advised the Neutral Member that a dispute existed between the parties concerning the Carriers' right to avail itself of the procedures of Article 7 of the National Agreements, which dispute had been submitted to their respective National Disputes Committees. They insisted that until such time as the National Disputes Committees had resolved the dispute before them, Arbitration Board No. 292 lacked authority to proceed. The Carrier disagreed and insisted that Arbitration Board No. 292 proceed to resolve the dispute which it had been established by the National Mediation Board to resolve.

In view of the dispute between the parties as to the Board's authority, the Neutral Member of the Board convened Arbitration Board No. 292 at the Carriers' office, Erwin, Tennessee April 19, 1966.

. . . for purposes of organization of the Board, consideration of these positions of the parties, and a determination of the Board's next steps.

The Board met on April 19, 1966 and the positions of the parties with regard to the Board's authority to act were fully explored and made a matter of record in the Official transcript of Proceedings. Thereafter, on May 11, 1966, the Neutral Member and Chairman of the Board advised the parties and the partisan members of the Board that:

After a careful review of all the evidence and agruments advanced by the parties . . . I have no choice

but to conclude that this Board must proceed to a consideration of this dispute on its merits.

I must find that Article 7 of the ORC&B National Agreement of May 23, 1952, and Article 7 of the BRT National Agreement of May 25, 1951, govern in this dispute, and represent the mutually agreed-upon procedures for resolving it, including the parties' agreements to arbitrate this dispute.

I must further find that under the terms of these governing Agreements the matter now at issue before Arbitration Board No. 292, for resolution on its merits, is that specified in Article 7 (c) (1) thereof as follows:

> . . . any facilities that should be furnished to provide accommodations substantially equivalent to those formerly available on the cabooses and used by the employees and appropriate arrangements for supplying and servicing such pooled cabooses.

In accordance with these determinations, the Board was next convened at Erwin, Tennessee, January 4, 1967 to consider the dispute on the merits. The Labor Party Members participated after making clear again that it was their position that Arbitration Board No. 292 did not have jurisdiction, and without waiving "any right, legal or otherwise." Recognizing the Labor Party Members' right to reserve such legal or other rights as they might have, the Board proceeded to a consideration of the case on its merits, that is on the issue as stated in the Neutral Members' letter to the parties, May 11, 1966 (see above).

Concerning this issue, the request of the Employees' Representatives was for:

1. Assigned lockers for each employee at Erwin, Tennessee.

2. Assigned lockers for all regular assigned crews at their away-from-home terminal.

3. Assigned lockers at all away-from-home terminals for pooled crews.

4. Kitchen facilities, including refrigerators and stoves at all away-from-home terminals to include Spartanburg, Spruce Pine, Bostich, Kingsport, Dante and Elkhorn.

5. Setting up, within the Award, appropriate arrangements for the servicing, cleaning and supplying of cabooses at regular intervals.[1]

The Carrier is agreeable to furnishing:

1. Individual lockers of the standard dimensions for assigned crews at established away-from-home terminals for crews whose cabooses are pooled.

2. Sufficient lockers on what is commonly called a chain gang basis for other crews tied up at away-from-home terminals.

3. Assigned lockers at home terminals for assigned (i. e., advertised,) crews, including pooled crews, whose cabooses are pooled.

The Carrier contends that the matter of servicing and supplying of cabooses is already taken care of by practice, custom, rule and exisiting Agreements, and calls for no action by this Board. It further contends that it is now furnishing suitable lodgings and meal allowance and that, therefore no refrigerator or kitchen facilities should be required.[2]

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[1] See Transcript, pp. 294-293.

[2] See Transcript, pp. 296-298.

Findings:

On the basis of the record before it, the Board finds that in order to provide accommodations substantially equivalent to those formerly available on the cabooses and used by the employees, the Carrier should furnish the employees:

I. Individual, assigned lockers for all affected employees at their home terminal.

II. Individual, assigned lockers for all regular assigned crews at their away-from-home terminals.

III. Sufficient lockers on what is commonly called a chain gang basis for other crews tied up at away-from-home terminals, such lockers to be for the exclusive use of such crews.

IV. Refrigerators at all away-from-home terminals, including Spartanburg, Spruce Pine, Bostich, Kingsport, Dante and Elkhorn. The record indicates that such facilities are already available at all terminals except Dante (Tr. 260).

V. Lockers to be furnished as above should be at least 18 inches by 21 inches by 72 inches in size.

VI. The Board further finds that pooled cabooses should be properly supplied and serviced by the Carrier and be maintained at all times in condition comparable to that in which they have been maintained prior to pooling, such servicing to include proper cleaning at regular intervals.

VII. On the record before it, the Board cannot find that kitchen facilities at all away-from-home terminals as requested by the Employees are required in order to provide accommodations *substantially equivalent* to those formerly available on the cabooses *and used by the employees''* (Emphasis added).

Award.

The Carrier shall furnish facilities as per findings.

/s/ Byron R. Abernethy,
Byron R. Abernethy,
Neutral Member and Chairman,

/s/ L. R. Beals,
L. R. Beals,
Personnel Officer and Assistant to General Manager Clinchfield Railroad Company, Carrier Member,

/s/ C. E. Charles,
C. E. Charles,
Clinchfield Railroad Company, Carrier Member.

.....

W. W. Carson,
Vice President, Order of Railway Conductors and Brakemen,
ORC&B Member,

.....

J. M. King,
Vice-President, Brotherhood of Railroad Trainmen,
BRT Member.

In the Matter of: The Clinchfield Railroad Company, and Brotherhood of Railway Trainmen, and Order of Railway Conductors and Brakemen.	Arbitration Board No. 292, Case A-7432. Pooling of Cabooses.

(Award Rendered May 3, 1967.)

Certification.

This is to certify that the foregoing Award is the true Award of this Board of Arbitration in the above-entitled matter to be filed in the Clerk's office of the District Court of the United States for the Eastern District of Tennessee, North Eastern Division, and that the record to be filed herewith, consisting of a Transcript of Proceedings of the Board in two volumes and 300 pages; the Employees opening statement at the initial meeting of this Board, April 1966, an undated letter addressed to the Chairman, consisting of four pages and signed by W. W. Carson and J. M. King, plus five pages of attached excerpts from ORC&B Agreements for 1. Wage Increases, 2. Cost-of-Living Basis for Wage Rate Adjustments, 3. Rules changes applicable to Road Trainmen, Yardmen, Yardmasters, Stewards, etc., and for 4. 5-Day Work-Week, and Interim 6-Day Work-Week applicable to Yardmen and Yardmasters identified as Employees Exhibit No. 1; A letter addressed to Mr. L. R. Beals, Mr. Charles Luna and Mr. G. H. Harris, dated September 24, 1965, from Mr. Thomas A. Tracy, Executive Secretary, National Mediation Board, identified as Carrier Exhibit No. 1; A letter from Mr. Charles Luna to Mr. Thomas A. Tracy, dated December 22, 1965, consisting of two pages, identified as Carrier Exhibit No. 2; A letter from

Mr. G. H. Harris to Mr. Thomas A. Tracy, dated December 24, 1965, consisting of two pages, identified as Carrier Exhibit No. 3; A one-page letter from Thomas A. Tracy, Executive Secretary, National Mediation Board, dated January 3, 1966, addressed to Mr. L. R. Beals, Mr. Charles Luna and Mr. G. H. Harris, identified as Carrier Exhibit No. 4; and a Statement of Labor Party Members before Arbitration Board No. 292, A-7432, undated, consisting of three pages, constitutes the evidence of the proceedings before the Board relating to the aforesaid Award.

/s/ Byron R. Abernethy,
Byron R. Abernethy, Neutral Member,

/s/ L. R. Beals,
L. R. Beals, Carrier Member,

/s/ C. E. Charles,
C. E. Charles, Carrier Member,

W. W. Carson, Employee Member,

J. M. King, Employee Member.

State of Tennessee, }
County of Unicoi. }

On the 3rd day of May, 1967, before me the undersigned notary public in and for the State of Tennessee and the County of Unicoi, appeared Byron R. Abernethy, L. R. Beals, C. E. Charles, to me known to be persons described as Arbitrators in the foregoing Award who executed the same and duly acknowledged execution thereof for the purpose and purposes therein expressed.

/s/ W. W. Grubb,
W. W. Grubb, Notary Public.

My Commission Expires: January 15, 1969.